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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, et al.,
Petitioners,

v.

CITY OF DETROIT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

This case involves a challenge by certain white police officers and a union representing Detroit police sergeants and lieutenants to a comprehensive voluntary affirmative action program of the Detroit

Police Department (hereinafter "the DPD"). Petitioners' claim concerns the effect of the program on police officers who are seeking promotion from the rank of sergeant to lieutenant. (App. 2a). In 1980, some of the petitioners in this case and others petitioned this Court to review the DPD's program insofar as it affected police officers seeking promotion from the rank of police officer sergeant. The Court denied that petition. See Detroit Police Officers Assn. v. Young, 452 U.S. 938 (1981).

The affirmative action plan was adopted in July 1979 for the express purpose of remedying prior pervasive racial discrimination by the police department in its hiring and promotion policies.[1/] As stated by the Court of

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1/ One aspect of this remedy was to satisfy the DPD's operational needs for more black officers in all ranks. The

Appeals, "[t]he record is replete with evidence ... that the Board of Police Commissioners was correct in finding that the Detroit Police Department had employed a consistent, overt policy of discrimination against blacks in all phases of its operations." App. 16a. Affirmative measures were utilized only after less

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1/ continued

phrase "operational needs" describes the Detroit Police Department's need to restore good relations between the Department and Detroit's black community. The condition from which the Department's operational needs arose is a direct result of years of racially motivated exclusion of blacks from employment, racial strife between the police and black citizens, and neglect and abuse of black citizens. See App. 32a, n.44 and 219-20. The district court found that the "underlying cause" of poor police community relations in Detroit was the police department's attitude toward blacks." App. 224a. The court of appeals concluded that "[w]e are faced .. with a population that has been subjected to constitutional indignities as a direct result of the discriminatory practices which have created and maintained a white-dominated police force." (court's emphasis). App. 32, n.44.

drastic measures had failed to remedy the effects of prior discrimination, see pp. 21-2, infra.

The program was adopted by the Detroit Board of Police Commissioners ("the Board"). The Board, which is comprised of five civilian Detroit citizens who are appointed by the mayor with the approval of the City Council, is the entity which, under the Detroit City Charter, is charged with broad responsibility for establishing the policies, rules and regulations of the police department. (App. 149a). The Board reached its decision that affirmative measures are necessary to correct longstanding past discrimination after intense investigation and deliberation, including three formal administrative hearings which were open to the public.

The affirmative action program includes a variety of measures designed to enhance the employment opportunities for minorities in the police department and to increase minority participation at all levels. One aspect of the plan was a preferential system of hiring and promotion. Insofar as petitioners' claims are concerned, the means employed by the Board to remedy the racially discriminatory condition it found involves, inter alia, the promotion of fully qualified black and white officers on a one-to-one basis until the rank in question is approximately 50% black. The Board selected the 50% end-goal on the basis of evidence which revealed that as of the time of adoption of the program in 1974 the Detroit labor market for police officers was approximately 50% black. District Ct. Op., App. 242a; Trial exhibit 240 at pp. 14-15. The Board has

also declared that the program will terminate when that goal is attained. App. 242a.

In examining the plan's purposes and its underpinnings, the district court applied the "strict scrutiny" standard. (App. 205a). Having determined that the program was aimed at remedying identified racial discrimination, (App. 205-13a), the court went on to consider whether the means were closely related to that goal. (App. 213a-16a). It concluded that the one-for-one promotion ratio was appropriate in the circumstances but directed the Board to fix an end-goal. (App. 235a). The district court subsequently approved the end-goal fixed by the Board, App. 242a, and incorporated the Board's resolution into its Judgment. The Sixth Circuit affirmed the district court's determinations but vacated its Judgment insofar as it purported to

embody the Board's resolution into a court order. Accordingly, the affirmative action plan remains in effect pursuant to the powers the Board derives from the Detroit City Charter. App. 78a.

ARGUMENT

A. Introduction

Petitioners have presented four separate questions for review and have offered three reasons why the questions presented deserve full consideration by the Court. As we show below, none of the questions stated are presented under the facts of this case.

Moreover, the reasons advanced by the petitioners for granting the writ simply do not exist with respect to this case. The decisions below are clearly consistent with the governing decisions of this Court. There is no conflict among the

the circuits with regard to the issues for which review is sought. Furthermore, the issues raised are fact specific.

B. The Questions Stated In The Petition Are not Presented By The Facts Of This Case

In the first question, petitioners ask whether an affirmative action program which includes promotional ratios should be reviewed under a standard of "reasonableness," and accuse the courts below of applying such a test. However, it is clear that both the District Court, see p. 5, supra, and the Court of Appeals, see pp. 12-13, infra, applied the "strict scrutiny" test.

In the second question petitioners inquire whether a municipality may voluntarily adopt an affirmative action program which incorporates promotional ratios "where a collectively bargained non-discriminatory merit examination process

is already in place." See Pet. Brief, p. i. However, the courts below concluded that the selection process is discriminatory because it is not job related and it does not remedy the effects of prior discrimination. Thus, although the lieutenants' examination process when viewed in isolation did not disproportionately affect those blacks participating in the process, the severe adverse effects of the hiring and sergeant screening processes resulted in an "atypical pool" of candidates participating inthe lieutenant selection process. (App. 154-55a) The district court concluded that "many more blacks would have been present in all ranks, including that of lieutenant, had discriminatory practices not been followed." App. 156a.

In the third question, petitioners ask whether the percentage end-goal of such a

program should be pegged to the proportion of blacks in the general population as contrasted with the proportion of blacks in the relevant labor market. Petitioners' Brief, p. i. However, as discussed at pages 17-18, infra, the Chief of Police and the Board based their determination on what constitutes an appropriate percentage end-goal, in part, on the proportion of blacks in the relevant labor market.[3/]

The fourth question proceeds from an assumption that all discriminatory practices have ceased and that what remains to be redressed is the impact of long-ended discrimination against the black population generally. Neither the Board nor the courts below agreed with petitioners that all discriminatory practices and their

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3/ The factors on which the end-goal was fixed are set forth in a December 6, 1979 presentation of the Chief of Police to the Board and are summarized at p. 18, infra.

effects had been eliminated.[4/] Moreover, neither the Board nor the courts below were able to agree with petitioners that the operational needs of the DPD involves wrongs against black citizens which had all occurred "many years earlier." See Pet. Brief, p. i. These wrongs were occurring up through the time the Board adopted the affirmative action policy, see 219a-228a, and the consequences of those wrongs were being felt at the time of trial. See App. 227a. Finally, the Board's determination to continue the program after 1979[5/] was

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4/ Petitioners contended that such practices were remedied at the rank of lieutenant approximately two years after adoption of plan. See App. 74a. The Board and the district court concluded, on the basis of the evidence before them, that it would take a substantially longer period to effectuate a complete remedy. See Ex. 240 and 242 and App. 242a.

5/ The Board fixed an end-goal for the program in December 1979 following the district court decision on liability.

not based solely on operational needs considerations. See Ex. 240 and App. 238a-42a. Accordingly, the fourth question is not presented by the facts of this case.

C. The Reasons Offered For Granting The Writ Are Inapposite

1. The Decisions Below Are Clearly Consistent With The Governing Principles Set Forth in Bakke and Fullilove

Petitioners claim that the decisions below conflict "in principle" with Bakke, Weber and Fullilove and that they "squarely collide with the principle that the nature of the violation determines the scope of the remedy." See Pet. Brief, p. 14. Petitioners have accused the lower courts of failing to apply the "strict scrutiny" test. This accusation is unsupportable in view of the Sixth Circuit's unambiguous statement that the "strict scrutiny"

standard applies. Judge Jones wrote:

> At the outset, we note that the standard [to be applied] is one which does apply strict scrutiny.

App. 11a. Following the counsel of Chief Justice Burger in Fullilove, 448 U.S. at 491, the circuit court proceeded to apply "the most searching examination" of the plan. Id. It concluded that the Board's affirmative action program was, in fact, a remedial program, designed specifically to remedy identified unlawful racial discrimination and that the remedial means employed were appropriate in light of the plans' objectives. In applying these standards the Sixth Circuit relied specifically on this Court's decisions in Bakke and Fullilove. See App. 13a.

The Court has consistently affirmed that racial preferences in hiring and promotion are permissible under the Fourteenth Amendment to remedy past discrimi-

nation by the employer. Five members of the Court agreed in Bakke that race conscious remedies are appropriate for proven discrimination. 438 U.S. at 301 (Powell, J.); id. at 353 & n.28 (Brennan, White, Marshall & Blackmun, J.J.). Courts of appeals' decisions approving race conscious hiring remedies by governmental employers have been cited with approval. E.g., Fullilove, 448 U.S. at 510 (Powell, J.).

Moreover, the fact that Detroit's affirmative action program was adopted voluntarily, rather than imposed by a court, does not render it unconstitutional. A majority of the Court has concluded that race conscious remedies are appropriate where there have been "judicial, administrative or legislative findings of constitutional or statutory violations." Fullilove, 448 U.S. at 497 (Powell, J.); Bakke, 438 U.S. at 307 (Powell, J.); id. at 366,

n.42 (Brennan, White, Marshall & Blackmun, J.J.). In this case, an administrative body and two courts have found massive intentional past discrimination.

The scope of the race conscious adopted by the Board clearly is appropriate in the circumstances of this case. The Board found that the exclusion of and discrimination against blacks by the Police Department had been longstanding, blatant and pervasive. In this situation, a strong remedy is required.

Petitioners' major complaint about the promotion program is the end goal of 50% black representation at the lieutenant level. Focusing on the number of black sergeants in the Department as of June 1978, petitioners argue that in the absence of discrimination blacks would have comprised only 25 percent of the total number

of lieutenants. However, petitioners ignore the fact that the City's prior discrimination in hiring and promotion resulted in severe underrepresentation of blacks in the sergeant position. This is not a case, as petitioners' contend, where the remedial goal was pegged to general population percentages, rather than to the appropriate labor market. Rather, because blacks had been discriminatorily excluded from the sergeant pool, the most reliable method of estimating the labor pool that would have existed in absence of prior discrimination involved use of labor market percentages.

The Board adopted the affirmative action program and subsequently fixed a 50% end-goal following careful examinations of Detroit's experience with racial discrimination within the DPD, the consequences of that discrimination on black applicants and

employees and on black citizens, and evidence of the probable racial composition of the DPD absent discrimination. The Board's decisions with respect to overall policy and implementation were made only after it had conducted a series of public sessions in which it invited and received the views of interested individuals and groups.[9/] The factors which led the Board to select a 50% end-goal may be summarized as follows:

a. The Department's discriminatory hiring practices did not end until after 1974.

b. The Department's best estimate is that the relevant labor market was approximately 50% black in 1974.

9/ Petitioners' counsel participated in those sessions but declined to offer evidence of what he believed would be an appropriate end-goal. See App. 236 and Ex. 342, p. 12.

c. The recognition that absent discrimination the ranks of sergeant and lieutenant would be more than 50% black given the higher propensity of black officers to apply and if hired to remain with the Department longer than their white counterparts.

d. The belief that adoption of a 50% end-goal would signal the community that the Department was irrevocably committed to substantial change from the past.

See Ex. 240, pp. 14-15.[10/]

2. There Is No Conflict Among The Circuits

Petitioners contend that conflicts among the circuits exist with respect to

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10/ Petitioners also criticize what they view as an absence of procedural safeguards to assure that the program is specifically tailored to serve a compelling state interest. In doing so they have ignored the Board's practice of holding extended public meetings each time important policy questions are considered. They refer instead to the procedures which are available for review of individual grievances under §7-1114 of the Detroit City Charter. The Board refused to review its policy determination under this procedure.

three different aspects of the rulings below. Petitioners misconstrue both the decisions of other courts and the decisions below in a futile attempt to support such an assertion.

The courts of appals are unanimcus in their approval of racial preferences in hiring and promotion as a remedy for past discrimination. Petitioners can cite no decision holding otherwise. Instead, petitioners focus on the scope and extent of the remedial plans approved by the lower federal courts. Because the scope of the remedy is detrmined by the nature and extent of the violation,the outcomes of individual cases will necessarily differ, reflecting the particular circumstances of those cases.[8/]

8/ For example, the question of race conscious remedies in employment may arise in the context of a remedial court order which was bottomed on a non-pervasive pattern of

8 / continued

unlawful racial discrimination, see Kirkland v. N.Y.S. Dept. of Correctional Services, 520 F.2d 420 (1975); in the context of a consent decree, which for a relatively short period of time provided certain employment advantages to minorities and women, see EEOC v. A.T. & T., 556 F.2d 167 (3d Cir. 1977); or in the context of judicial findings of pervasive patterns of racial discrimination in employment, see United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) and F.I.R.E. v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980).

Petitioners comparison, as an example of the "confusion and conflict" which they say exists, of the alleged durational difference between the remedial order in NAACP v. Allen, 394 F.2d 614, 621 (5th Cir. 1974) and the plan approved by the district court in this case, is illustrative. See Pet. Brief, p. 13. In the former case the Fifth Circuit required that the race conscious hiring order for the Alabama highway patrol "spend itself" when black officers constitute 25% of that employer's workforce. The court reported that according to the 1970 census, blacks constituted 26.29% of the Alabama population. See 394 F.2d at 617, n.3. In the latter case, the district court approved the Detroit Board of Police Commissioners plan which fixed a 50% end-goal. The Board based its determination in part on the fact that blacks constituted 50% of the relevant

Petitioners also contend that the decisions below failed to consider whether less harmful alternatives would cure the discrimination, and thus are in conflict with decisions in other circuits. Petitioners ignore the fact that the Sixth Circuit explicitly requires "a showing that no other approach offers a practical means of achieving the ends of the program

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8 / continued

labor market. Thus, both plans designed to be temporary measures which will "spend" themselves when black representation approaches parity with the representation of blacks in the relevant population.

Similarly, petitioners cite the Second Circuit's decision in Kirkland v. New York State Department of Correctional Services, 520 F.2d 420 (1975) as disapproving of the use of race conscious remedies affecting promotions. However, as noted above, see pp. 19-20, Kirkland merely concluded that the remedy was not appropriate in the facts of that case. Moreover, in a different, more recent case involving the same plaintiff, the Second Circuit expressly approved the use of a race conscious promotion remedy. Kirkland v. N.Y. State Dept. of Correc. Services, 711 F.2d 1117, 1134 (1983).

in the foreseeable future," Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 694 (1979), and that the City of Detroit had tried less drastic measures which did not succeed. App. 113a-123a.

3. The Issues Raised Are Fact Specific

Petitioners also offer that this case presents a fully developed record for the Court to decide questions relating to the remedial use of racial preferences in public employment. However, as discussed above, the appropriateness of the remedial use of such racial preferences is entirely dependent on the circumstances of the particular case. The general principles governing such preferences have been established by the Court's prior decisions and the unanimous conclusion of the courts of appeals. In essence, petitioners' claim is a factual one -- that the Board of Commissioners improperly computed the appropriate

labor market in setting the end-goal. The district court and court of appeals have reviewed this factual claim and found it to be erroneous.

The record in this case is quite substantial. (See App. 94a-95a). However its very size and complexity illustrates why this is not an appropriate case for review of the issues petitioners seek to present. The problems and consequences of unlawful racial discrimination which Detroit faces are enormously complex. Few cities may face problems as complex and as intractible was the experience of Detroit. Certainly, few will reach a point, such as that facing Detroit in 1974, when it had to admit publicly the existence of pervasive patterns of unlawful discrimination and begin to address directly "the ongoing crisis in relations between the (police) Department and the black community." (App. 22la.). Accordingly, a deci-

sion in this case may have little application elsewhere.

Petitioners also contend that this case presents "pervasive issues of vital national concern." Pet. Brief, p. 9. Respondents agree that the issue of how to remedy longstanding and pervasive employment discrimination is important. However, as discussed above, the governing principles are already well-established, and petitioners' main concern seems to be the factual application of those principles. Petitioners' reliance on a Report of the United States Civil Rights Commission and a certification by the United States Attorney General is misplaced.

One searches the page cited the in Civil Rights Commission report in vain for the reference quoted by petitioners. See U.S. Commission on Civil Rights, Affirmative Action in the 1980's Dismantling the

Process of Discrimination 28 (1981). The Commission report does indicate the existence of some remaining questions regarding the standards governing affirmative action, but it reports that this Court's affirmative action cases "shows strong commitment to affirmative action measures designed to eliminate all forms of discrimination..." Id. We observe that petitioners have neglected to report that the same Commission publication noted that the circuit courts are unanimous in the view that the use of race conscious measures as a means of remedying prior discrimination in employment, including municipal employment, is permissible. Id., pp. 28-9.

The Certificate of Public Importance issued by the Attorney General is concerned exclusively with an interpretation of the power of a district court under § 706(g) of Title VII of the Civil Rights Act of 1964,

as amended, 42 U.S.C. §2000e et seq., to order race conscious remedies. (App. 46a). The Sixth Circuit vacated the final order of the district court. (App. 78a). Accordingly, this case no longer presents issues relating to the reach of § 706(g) and Attorney General's certificate to which petitioners have referred is of no relevance to this case in its present posture.

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari should be denied.

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